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| Title | Appellate Procedure: Time for Ordering Review on Supreme Court's Own Motion (amend Cal. Rules of Court, rule 28.2) |
| Summary | The proposed amendment to rule 28.2 would clarify that when the Supreme Court decides to deny a petition for review but nevertheless to order review on its own motion, it may so order within the time that it has jurisdiction to grant the petition. |
| Source | Appellate Advisory Committee Justice Joyce L. Kennard, Chair |
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| Discussion | <p>Subdivision (d) of rule 28.2 is ambiguous in prescribing the time within which the Supreme Court may order review on its own motion in cases in which a party has filed a petition for review. In such cases the court may occasionally decide to deny the petition but nevertheless to order review on its own motion—for example, when the party seeks review only on an issue that the court deems unworthy of review but fails to seek review on an issue that the court does wish to reach. The court has consistently construed the rule to allow it to deny such a petition but order review on its own motion within the time in which it could grant the petition. This amendment would adopt that construction and clarify that the court may order such review within the time that it has jurisdiction to grant the petition for review, i.e., within a total of 90 days after the petition is filed.</p> <p>The amendment would also reorganize certain provisions of the rule into a more logical sequence.</p> <p>The Appellate Advisory Committee invites public comment on this proposal.</p> |
| Attachment | |

Rule 28.2 would be amended, effective January 1, 2004, to read:

Rule 28.2. Ordering review

(a) * * *

(b) Determination of petition

(1) The court may order review within 60 days after the last petition for review is filed. Before the 60-day period or any extension expires, the court may order one or more extensions to a date not later than 90 days after the last petition is filed.

~~(2) An order granting review must be signed by at least four justices; an order denying review may be signed by the Chief Justice alone.~~

~~(2)(3)~~ If the court does not rule on the petition within the time allowed by (1), the petition is deemed denied.

~~**(c) Grant and hold**~~

~~On or after granting review, the court may order action in the matter deferred until the court disposes of another matter or pending further order of the court.~~

~~**(d)**~~**(c) Review on the court's own motion**

(1) ~~In any case,~~ If no petition for review is filed, the Supreme Court may, on its own motion, order review of a Court of Appeal decision within 30 days after the decision is final in that court. Before the 30-day period or any extension expires, the Supreme Court may order one or more extensions to a date not later than 90 days after the decision is final in the Court of Appeal. If any such period ends on a day on which the clerk's office is closed, the court may order review on its own motion on the next day the clerk's office is open.

(2) If a petition for review is filed, the Supreme Court may deny the petition but order review on its own motion within the periods prescribed in (b)(1).

1 **(d) Order; grant and hold**

2
3 **(1) An order granting review must be signed by at least four justices; an**
4 **order denying review may be signed by the Chief Justice alone.**

5
6 **(2) On or after granting review, the court may order action in the matter**
7 **deferred until the court disposes of another matter or pending further**
8 **order of the court.**

9
10 **Advisory Committee Comment (2003)(2004)**

11 New rule 28.2 collects in one rule provisions of former rules 28 and 29.2 governing the transmittal
12 of the record on petition for review, the time within which the Supreme Court may grant or deny review,
13 “grant and hold” orders, and ordering review on the court’s own motion.

14
15 **Subdivision (a).** Subdivision (a) of new rule 28.2 simplifies a provision of former rule 28(b) by
16 directing the Court of Appeal clerk to send “the record” to the Supreme Court; further specification is
17 unnecessary. The subdivision also deletes as unnecessary micromanagement the former directive to the
18 Supreme Court clerk to retain and renumber that record if review is granted.

19
20 **Subdivision (b).** Former rule 28(a)(2) authorized the Supreme Court to grant review within 60
21 days after the filing of the last “timely” petition for review, but the word “timely” was both ambiguous and
22 superfluous. The Supreme Court deems the 60-day period to begin on the filing date of the last petition for
23 review that either (1) is timely in the sense that it is filed within the rule time for such petitions (i.e., 10
24 days after finality of the Court of Appeal decision) or (2) is *treated* as timely—although presented for filing
25 after expiration of the rule time—in the sense that it is filed with permission of the Chief Justice on a
26 showing of good cause for relief from default (former rule 45(c), now revised rule 28(e)(2)). In each
27 circumstance it is the *filing* of the petition that triggers the 60-day period. New rule 28.2(b) therefore
28 deletes the word “timely”; no substantive change is intended.

29
30 **Subdivision (c).** Subdivision (c) of new rule 28.2 is former rule 29.2(c). Its wording has been
31 conformed to current Supreme Court practice; no substantive change is intended.

32
33 **Subdivision ~~(d)~~(c).** Subdivision ~~(d)~~(c) of new rule 28.2 is former rule 28(a)(1), authorizing orders
34 of review on the Supreme Court’s own motion. The former provision, however, apparently assumed the
35 court would exercise this authority only in cases in which “no petition for review is filed.” The assumption
36 was not prima facie unreasonable, but in practice the court may occasionally wish to order review on its
37 own motion even when a party has petitioned for review—for example, in a case in which the party seeks
38 review only on an issue that the court deems unworthy of review and fails to seek review on an issue that
39 the court does wish to consider. To fill this gap, subdivision ~~(d)~~(c)(2) simply expressly authorizes the court
40 in such a case to “deny the petition but order review on its own motion in any case.” within the periods
41 prescribed in subdivision (b)(1), i.e., during the time that it has jurisdiction to grant the petition for review.

42
43 **Subdivision (d).** Subdivision (d)(2) of new rule 28.2 is former rule 29.2(c). Its wording has been
44 conformed to current Supreme Court practice; no substantive change is intended.